

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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December 2, 2011

to: Thomas R. Mackinson

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(Small Business/Self-Employed)

from: Lawrence Mack

Chief, Branch 4

(Procedure & Administration)

subject: Pre-negotiation Advice in Connection With Possible Agreement With State Taxing
Authorities Regarding Competing Liens on Personal Property

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

FACTS

You have requested our views on several legal principles related to competing federal and state liens on personal property before deciding whether to proceed to negotiate a possible memorandum of understanding (MOU) with the

LAW AND ANALYSIS

Treasury Order 150-10 provides to the Commissioner a broad grant of authority to administer and enforce the Internal Revenue laws. As a result, the Commissioner has the authority to enter into binding agreements with state taxing authorities for the purpose of administering and enforcing the Internal Revenue laws provided that the substance of the agreement is consistent with the Commissioner's authority and responsibilities and does not violate federal law. The above advice was coordinated with _____ of CC:GLS.

A binding MOU with a state taxing authority under which a state tax lien would be deemed discharged if the state failed to respond to the Service's request for discharge would not violate any obligation of the Service under existing federal law. Similarly, it

would not violate any obligation of the Service under existing federal law for the Service to enter into a binding MOU with a state taxing authority under which the state would be deemed to have consented to the sale of property free and clear of state tax liens where the state does not respond to a request by the Service for such consent. Whether such an MOU would violate any obligation of the state taxing authority under state law must be determined by the state.

Pursuant to section 6331(j), the Service has the obligation to conduct a thorough investigation of the status of property that it intends to sell under section 6335 prior to levying on such property. The investigation must include “the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability” of the taxpayer. I.R.C. § 6331(j)(2)(c). The Service may rely on a deemed discharge or deemed consent, which is the product of the MOU you described, in determining that there is sufficient equity for purposes of section 6331(j). Moreover, even if the MOU was nonbinding, the Service could nevertheless rely on a deemed discharge or deemed consent resulting from the MOU as long as the Service does not have reason to believe that the state taxing authority will fail to comply with the MOU. As long as such reliance is reasonable, it would not be inconsistent with congressional intent to protect the interests of taxpayers. See S. Rep. No. 105-174, at 85-86 (1998) (explaining that Congress codified the provision found in section 6331(j), which had previously been IRS administrative policy, because it believed that the provision provided important protections to taxpayers). Presumably, the Service would not request that the state taxing authority discharge its lien unless the discharge of the senior state lien would result in sufficient equity in the property to result in net proceeds for application to the federal tax liability.

If, however, the MOU imposed reciprocal obligations on the Service, the MOU would violate the Service’s obligations under existing federal law. Section 6325(b) gives the Service the discretionary authority to discharge any part of property subject to any federal tax lien in the following circumstances:

(1) the value of the property remaining subject to the lien is sufficient as determined by section 6325(b)(1); (2) partial payment is made in the amount of the government’s interest in the property that is to be discharged; (3) the government’s interest in the property that is to be discharged has no value; (4) the property is sold and the proceeds are to be held, as a fund subject to the government’s liens and claims, in the same manner and with the same priority as such liens and claims had with respect to the discharged property; or (5) the owner of the property deposits an amount equal to the value of the government’s interest in the property or furnishes a bond acceptable to the Service in a like amount.

Any agreement to discharge a part of the property subject to the federal tax lien that does not ensure that one of the section 6325(b) conditions described above is met would exceed the Service’s authority under section 6325(b). Even if the Service expects to affirmatively respond to each request, the effect of any such agreement, as

proposed, could be to discharge property outside of the Service's authority and therefore violate the Service's legal obligations.

Section 7425(c)(2) authorizes the Service to consent to the sale of property free and clear of the government's lien or title and does not itself impose any conditions on the Service's authority. See H.R. Rep. No. 89-1884, at 72-73 (1966) (providing that the lien discharge procedure under section 6325(b) does not preclude the use of the consent procedure under section 7425(c)(2)). The section 7425 regulations, however, limit the Service's discretion to consent to the sale of property free and clear of the government's lien or title to situations in which adequate protection is afforded the government's lien or title.¹ See Treas. Reg. § 301.7425-3(b)(1). Moreover, the regulations require that consent be given in writing and prohibit the Service from consenting to a sale of property free and clear of the government's lien after the date of sale, as determined under Treas. Reg. § 301.7425. Id. Because of this, the Service must determine in writing in each case whether the government's lien or title is adequately protected and that the date of sale has not passed, and it would violate the Service's legal obligations to enter into an MOU that could result in a deemed consent to the sale of property free and clear of the government's lien or title if the Service does not respond to a proper request from a state taxing authority.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views. Please call if you have any further questions.

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¹ Neither the Code nor the regulations define "adequate protection." The Internal Revenue Manual provides that consent is considered adequate if: "(1) taxpayer has no equity in the property, (2) proceeds of sale are substituted as provided in IRC 6325(b)(3), (3) taxpayer's interest in the property is assigned to the Director, [Advisory Insolvency and Quality], (4) assignment of proceeds in excess of prior encumbrances is secured, or (5) any other circumstances acceptable to the [area office in which the sale occurs]." See IRM 5.12.4.6(2), Consent to Sale of Property Free of Lien.